

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BINSWANGER OF PENNSYLVANIA, : CIVIL ACTION  
INC. :  
 :  
v. :  
 :  
SPENCER'S INC. : NO. 99-2424

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

January 4, 2000

This action for breach of contract was filed in state court and removed by the North Carolina corporate defendant alleging federal jurisdiction under 28 U.S.C. § 1332. Before an answer was filed, plaintiff, a Pennsylvania corporation, filed an amended complaint adding a North Carolina corporate plaintiff, also a signatory to the contract at issue. Defendant has filed a motion to dismiss or strike the amended complaint because the amendment, destroying the jurisdiction of this court, was not properly made under Fed. R. Civ. P. 15(a). For the reasons set forth below, defendant's motion to dismiss or strike the amended complaint will be denied, and the action will be remanded to state court.

FACTS

On August 27, 1998, defendant Spencer's Inc. ("Owner") executed an exclusive listing agreement ("agreement") for real property in Virginia with plaintiff Binswanger of Pa., Inc., a Pennsylvania corporation ("Agent"). Binswanger Southern, N.C.,

and Binswanger of Pa. signed the agreement as Agent on July 13, 1998. The agreement authorized the agent to offer the property for sale at a specified price, or to lease at a specified rental price for a sale or lease commission of six percent of the purchase price or rental for the term of the lease and any renewal or extension. The agreement made certain provisions in the event of a sale or lease by the owner or anyone else during the one year term of the agreement. The agreement expressly provided that it was to be governed by and construed under the laws of the state where the property was located, i.e., the Commonwealth of Virginia. The parties agreed to the exclusive jurisdiction of the Court of Common Pleas of Philadelphia County and the United States District Court for the Eastern District of Pennsylvania for the resolution of any claims or disputes arising out of or relating to the agreement.

Binswanger of Pa., Inc. filed this action in the Court of Common Pleas of Philadelphia County; the action was properly removed on May 12, 1999 by Spencer's Inc., a North Carolina defendant. On May 21, 1999, before an answer was filed, Binswanger of Pa., Inc. filed an amended complaint joining Binswanger Southern, N.C. as plaintiff. The amended complaint alleges that the agreement was entered into with Binswanger Southern, N.C. and Binswanger of Pa., Inc. Binswanger Southern is a licensed real estate broker in the Commonwealth of Virginia,

although its principal place of business is North Carolina.

### **DISCUSSION**

Defendant's motion to dismiss or to strike the amended complaint will be denied. Fed. R. Civ. P. 15(a) allows one amendment of a complaint as of right if the opposing party has not yet answered the complaint, as was the case here.

Here, the amended complaint added a non-diverse plaintiff. But that does not end the matter. The court must decide whether, under Fed. R. Civ. P. 20, joinder was proper. Also pertinent is Fed. R. Civ. P. 21, which allows the court to order adding or dropping of parties in the event of misjoinder or non-joinder on motion of a party or on its own initiative. In making that determination, the court's discretion is guided by Fed. R. Civ. P. 19. In an action where jurisdiction is based on diversity of citizenship, addition of a non-diverse party destroys subject matter jurisdiction only if that party is indispensable under Rule 19. See Steel Valley Authority v. Union Switch and Signal Division, 809 F.2d 1006, 1010 - 1011 (3d Cir. 1987).

Rule 19(a) applies if a party's joinder will not deprive the court of jurisdiction over the subject matter. Under Rule 19(b), if joinder of a necessary party is not feasible, the court must determine if the party is indispensable.

Because the added plaintiff cannot be made a party without

destroying diversity jurisdiction, the court must determine whether the action should be dismissed because the added party is indispensable or should proceed by dismissal of the added party.

A judgment rendered in the absence of Binswanger Southern might be prejudicial to the Binswangers. If Binswanger Southern is a licensed real estate broker in Virginia as alleged in the complaint, and Binswanger of Pa. is not, only Binswanger Southern can recover. Under Virginia law (as under Pennsylvania law) only a licensed real estate broker can recover a commission for the sale of real estate. See Va. Code Ann. §§ 54.1-2106, 54.1-2107; Harrison & Bates, Incorp. V. LSR Corp., 385 S.E. 2d 624, 626 (Va. 1989). At the least, proceeding without Binswanger Southern will subject defendant to another action in state court. The two plaintiffs appear to be separate and indispensable; there would be no way by which a judgment or other relief would protect against further litigation in state court.<sup>1</sup>

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<sup>1</sup>Here, in the absence of Binswanger Southern complete relief cannot be accorded because, as the real estate broker licensed in Virginia, it may be the party actually entitled to the commission: disposition of the claim of Binswanger of Pa. without Binswanger Southern may either impede Binswanger Southern's ability to recover its commission or leave defendant subject to a substantial risk of incurring a double obligation by reason of the claimed interest.

No consideration may be given to the suggestion of an assignment made in plaintiff's memorandum in opposition. Statements in briefs, unsupported by affidavit, deposition or answer to interrogatories are not part of the record. The clause of the agreement permitting assignment does not lead to the conclusion that one has occurred in the absence of any evidence of record.

If the action is dismissed for lack of diversity, the parties will have an adequate remedy in state court. While the agreement contemplated an action in federal court and the removal was timely and proper, the parties also agreed to an action in the Court of Common Pleas of Philadelphia County. Remand to that court will not disturb the choice of forum of any party.

Accordingly, this action is remanded to the Court of Common Pleas of Philadelphia County forthwith pursuant to 28 U.S.C. § 1447(c). An appropriate Order follows.

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SPENCER'S INC.	:	NO. 99-2424

ORDER

AND NOW, this 4th day of January, 2000, upon consideration of defendant's motion to dismiss or strike the amended complaint and plaintiffs' response thereto, it is **ORDERED** that:

1. Defendant's motion to dismiss or strike the amended complaint is **DENIED**.

2. This action is **REMANDED FORTHWITH** to the Court of Common Pleas of Philadelphia County for lack of subject matter jurisdiction.

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S.J.